JD–58–98
Plymouth, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

STERLING MILLWORK, INC.

and **Case 7–CA–39645**

LOCAL 687, MICHIGAN REGIONAL COUNCIL OF CARPENTERS, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL–CIO

***Dwight Kirksey, Esq.*, for the General Counsel.**
***Nicholas Nahat, Esq.* (*Novara, Tesija, Michela & Priehs),* of Southfield, MI, for the Charging Union.**
***Dan W. Chandler, Esq.* (*Chandler, Bujold & Chandler),* of Troy, MI, for Respondent Company.**

DECISION

Statement of the Case

ROBERT T. WALLACE, Administrative Law Judge: This is basically a salting case. It was tried in Detroit, Michigan on December 8 and 9, 1997. The charge was filed on March 26, 1997[1] and the complaint was issued on June 30.

The complaint alleges that Respondent threatened, interrogated and otherwise coerced employees in violation of Section 8(a)(1) of the National Labor Relations Act and discriminatorily laid off 3 employees (Nicholas McCreary, Thomas Whitaker and Arthur Chaskin) in violation of Section 8(a)(3).

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following:

[1] All dates are in 1997 unless otherwise indicated.

Findings of Fact

I. Jurisdiction

Respondent, a corporation, is a commercial carpentry construction contractor with an office in Plymouth, Michigan. As pertinent, it performs construction at numerous sites in Michigan where it received during 1996 goods valued in excess of $50,000 from points outside the State of Michigan. Its annual gross revenue during that year exceeded $500,000. It admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

During the months of January and February the Union attempted to organize Respondent by setting up picket lines outside a number of its job sites. It also sought to place union members on Respondent's payroll as "salts," i.e., union organizers, under an arrangement whereby the Union undertook to upgrade to union scale whatever Respondent agreed to pay them.

One salt was Thomas Whitaker who had 15 years' experience as a carpenter. Responding to an ad, he met with personnel director Paul Drainville on January 7. Apparently pleased with his qualifications, Drainville inquired as to compensation desired by Whitaker. When the latter replied that he was "used to scale," Drainville told him that the pay would be less because the company was non-union. Whitaker replied: "It doesn't matter, I've worked . . . non-union . . . before, and I'm looking for work." He was hired 3 weeks later as a journeyman carpenter at $16 an hour ($5 less than scale) and told to report to project manager John Cummins at a site in West Bloomfield, MI where Respondent was subcontractor on a major renovation of the Knollwood Country Club. Crossing the picket line, Whitaker began work at the Knollwood site on the morning of January 30. Drainville assured him that the job probably would last until the end of August.

Nicholas McCreary, a journeyman carpenter with extensive experience, was another salt. He called Drainville on February 3 and asked if he was hiring carpenters. Drainville responded affirmatively and, on hearing McCreary's qualifications, inquired whether he was union and whether he would refuse to cross a picket line. When McCreary said "no" to both questions, Drainville told him he was hired and to report to Cummins at the Knollwood site on the following morning.[2]

[2] While inquiries concerning a job applicant's union status can be unlawful, here the question appears to be non-threatening and prompted by Drainville's concern about whether as a new hire McCreary would cross the picket line. See *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F. 2d 1006 (9th Cir. 1985). Accordingly, the pertinent Section 8(a)(1) allegation will be dismissed.

Both salts were assigned to project manager Cummins' "core" crew comprised of approximately 7 carpenters and 2 laborers. Work was plentiful and from time to time Cummins requested and used additional crews from other projects each of which had its own foreman. The latter took their general assignments from Cummins but directed their own crews in the performance of assigned jobs. For several weeks neither Whitaker nor McCreary in any way identified themselves as union members or solicited anyone to become such.

That situation changed on March 6 when McCreary went into his car at lunch time and reappeared wearing a hard-hat on which numerous union emblems were pasted[3] as well as a T-shirt emblazoned with a union logo. He then utilized remaining lunch time going from car to car talking up the Union with other employees.

When McCreary returned to his car to get his tool belt and return to work, Cummins approached and asked "What do you think you're doing talking union?" Without waiting for an answer, he told McCreary that "Sterling . . . was a non-union company and I will not have you talking about unionization on my job site [adding] you're a good worker but if you . . . continue talking union. . . I can could make life pretty tough for you and would lay you off when work gets slow . . . if you want to talk union do it at the Carpenters' union Hall while you play cards with all the other unemployed carpenters." He then directed McCreary to replace his hard-hat with the one issued to him by the company, adding "I don't want to look at all those union stickers." McCreary promptly complied and the conversation ended.[4] About an hour later while McCreary was working Cummins came by and asked whether he had talked union only at lunch time. McCreary answered "Yes, sir, only at lunch time." Cummins walked away without modifying his prior general proscription of union solicitation on-site.

I find Cummins' comments violative of Section 8(a)(1) in several respects. His proscription of proselytizing for the Union "on my job site" is too broad in that it precludes such activity during off-duty time, i.e., at breaks and at lunch time. Second, he communicated threats of layoff and of unspecified reprisal for continued involvement in protected organizational activity. Thirdly, in directing McCreary to remove the hard-hat, Cummins did not tell McCreary he was enforcing any company rule or industry practice concerning variant headgear, rather the reason he gave reeked of anti-union animus. Cummins' subsequent inquiry as to whether McCreary had limited his solicitations to the break period seems innocuous and prompted by belated awareness of applicable rules.

Although McCreary thereafter forbore wearing union insignia on the job, he

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[3] McCreary's hard-hat had a higher safety rating than the one issue him by Respondent.

[4] Cummins states that he had been informed of what McCreary's was doing at lunchtime by a senior member of his crew, carpenter Tom Brein. He claims to have immediately called the Respondent's owner, received instructions as to how properly to handle the situation and then proceeded to McCreary 's car where he simply inquired "What are you doing?" and, without waiting for an answer told him he could talk union but only on breaks. Assertedly, he told McCreary to remove the hard-hat because "It had a lot of stickers on it . . . was discolored and [of a] different type than he was used to seeing on the job site." Assertedly he saw but was not concerned about the T-shirt. McCreary's account is accompanied by convincing truth enhancing details and I have credited it as being more probable.

regularly promoted unionization during breaks and was not admonished in that regard. He also scheduled after-hours' union meetings at a local "Big Boy" restaurant, one on March 12 and another on March 18. The meetings were attended, respectively, by 5 and 8 other carpenters employed by Respondent at the site.[5]

On March 14 Cummins "popped" his head over a wall and asked McCreary "How's your organizing going?" McCreary smiled and replied "Fine, thank you." Having in mind Cummins' prior warnings, I find the inquiry impermissably intrusive and coercive. The test is not whether the coercion succeeded or failed but rather whether the employer's conduct tends to interfere with the free exercise of rights under the Act.[6]

On March 18 McCreary had another encounter with Cummins. The latter approach him while he was working on a roof and asked whether he was being subsidized by the Union. McCreary told him he could not answer that question. He then asked McCreary if there was any truth to the rumor that your work was done and you are ready to leave. McCreary responded that he "had no intention of going anywhere.[7] When Cummins opined that "work was going to get slow," McCreary politely replied "You have to do what you have to do" and went back to work.

Unlike McCreary, Whitaker never openly revealed his union membership or urged other carpenters to sign union cards. However, he urged them to listen to McCreary because unionization could mean more money. He often ate lunch with McCreary notwithstanding an awareness that McCreary was being shunned by some carpenters; and he attended both after-hours' union meetings, signed a union card and kept Union officials aware of what was going happening on site. Once while working on a roof he told Cummins he did not know how the safety harness worked. Cummins said, "Go see your buddy Nick [McCreary], and have him show you how to put it on." On another occasion, he told a union official that he would be off the site for one day with another carpenter (Tom Brein) working a job involving minor repairs to church. While there and under supervision of manager Drainville, a Union business agent arrived. Whitaker declined to take his business card and "stood aside" while the agent urged Brein to join the Union.

Arthur Chaskin, a journeyman carpenter with 20 year's experience, was neither a union member nor in contact with the Union at the time he was interviewed by Drainville. Hired at $16 an hour, he reported at the Knollwood site on February 10 and was assigned to Cummins's crew.

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[5] Asked whether he knew there had been Union meetings off the job site, Cummins replied: "Yes," I had people come in and tell . . . me there were meetings and this and that."

[6] *American Freightways Co.*, 124 NLRB 146, 147 (1959).

[7] McCreary concedes "it could well be" he started the rumor because on March 13 he had told another carpenter (Jack Hirn, who he felt was "milking" him for information) that he had signed the four best carpenters and that his work was done.

Responding to solicitations from McCreary and Whitaker, Chaskin attended the union meeting on March 12 where, along with 4 or 6 other carpenter employees of Respondent, including Whitaker, he signed an authorization card. He also attended the union meeting on March 18, urged other carpenters to do during break-time, and often ate lunch with McCreary and Whitaker.

On Friday, March 21, renovation and new construction at the Knollwood site were substantially behind schedule and there remained much carpentry work to be done. Nevertheless, Cummins chose that day to lay off three carpenters on his crew, McCreary, Whitaker and Chaskin. At the time two other five-man crews had been detailed to the site at Cummins' request.

Cummins spoke separately to each of the three during early afternoon. He informed McCreary and Whitaker that work would be slowing down, but did not explain why. Aware that other carpenters on his crew had been hired after McCreary, Cummins told him he was chosen because he was better able to get another job through his union connections and because he was not as reliable as a "family man"[8] and was apt to quit at any time in response to union orders. Whitaker (who was hired before McCreary) was simply told there was no work available and that prospects for recall were very low. Chaskin (hired a week after McCreary) was told that an anticipated slow down was due to "a problem with the steel." At least three carpenters were hired after Chaskin into Cummins' team: "Rex [Harvey], Jack [Simpson] and John [Hirn]."

The facts stated above concerning events of March 21 are essentially undisputed. While not denying that there was much carpentry work still to be done on site, Cummins testified that lessened need for carpenters arose from construction delays attendant upon need to replace defective structural steel beams, that flooded footings had to dry out before a concrete base could be poured and that those delays were expected to reduce need for carpentry by 50% for periods up to 2 weeks in some areas and up to 6 weeks in others.

The three laid off carpenters had not received any criticism of their work performance. Indeed Cummins concedes that they did well. He claims to have laid off Whitaker because he had less experience in rough carpentry than other members of his crew and that McCreary was in part laid off for the same reason. However, he did not mention that circumstance to them on March 21. As to why he selected Chaskin, Cummins testified: "Art [Chaskin] was familiar with the rough carpentry that we were doing but . . . I didn't see that he was one that I could give a few people to and at task to run at that time."

Although Respondent placed a want ad for carpenters in a local paper on May 4, personnel manager Drainville was unable to recall whether any were interviewed or hired during the period between March 21 and July 2. Cummins claims that no carpenters were added to his core crew during that period but he concedes that manpower on other crews working at the Knollwood site "fluctuated."

McCreary, Whitaker and Chaskin returned to work at Respondent's Knollwood

[8] Cummins apparently was unaware that McCreary was a married man with children.

site on July 3 pursuant to "non-admission" recall letters sent to each on June 27.

As to the March 21 layoffs, I find that supervisor Cummins had ample knowledge of the pro-union stance of the three selectees. McCreary expressly identified himself as a union member and salt. Chaskin actively solicited other carpenters to sign authorization cards during break periods and, admittedly, Cummins had channels of communication as to union activities occurring both on and off the site. Although Whitaker avoided any explicit indication that he was a union supporter, he consistently urged others not to reject unionization out of hand, often ate lunch with McCreary when the latter was being shunned by some carpenters, and Cummins viewed Whitaker as McCreary's "buddy."

Those circumstances, coupled with Cummins' expressed animus toward union supporters and the fact that the three were selected for layoff while less senior members of Cummins' crew were not, warrants an inference that the layoffs were due at least in significant part to their perceived alignment with the Union. Indeed, Cummins admits basing his selection of McCreary on an untenable assumption that union members are unreliable employees and that union officials would require them to quit on short notice.[9] Accordingly, it is incumbent on Respondent to demonstrate that they would have been laid off in any event.[10]

It has failed to do so.

In the absence of supporting evidence from an impartial source, I am not persuaded by project manager Cummins' testimony that he had to lay off 3 of 17 carpenters because some prerequisite installation of structural steel and a concrete base had been delayed. Also, he does not claim to have given this reason to McCreary or Whitaker when he laid them off and with regard to Chaskin he mentioned only a "problem with steel;" and all three selectees testified, credibly, that there was plenty of carpentry work still to be performed when they were laid off. Further, personnel manager Drainville appeared studiously vague when asked if he hired any carpenter between March 21 and July 3, answering: "I do not know, honestly." Accordingly, I find the stated reason for the layoffs to be pretextual.

Assuming *arguendo* that the reason had some validity, Cummins' selection of the 3 known union adherents rather than less senior carpenters patently was discriminatory. He offered them no reason at the time of layoff; and his testimony that McCreary and Whitaker were less able to perform rough carpentry belies not only their long varied experience but also the admitted competence of their on-the-job performance under his own direct supervision. As to Chaskin, a carpenter with over 20 years' experience, Cummins offered no reason at all. And asked whether, instead of laying off members of his own ("core") crew, he could have dismissed one of the two supplementary 5-man crews of carpenters working at the site pursuant to his earlier request for added help, he answered "I could. . . [have done] that" without saying why he opted not to do so.

[9] See *NLRB v. Town & Country Elec., Inc.,* 516 U.S. 85 (1995).

[10] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F. 2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Conclusions of Law

Respondent violated the Act in the particulars and for the reasons stated above; and its violations have affected, and unless permanently enjoined will continue to affect, commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having discriminatorily laid off employees, Respondent must make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of layoff to the date they were recalled less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Disposition

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

Respondent Sterling Millwork, Inc., of Plymouth, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating overly broad rules against solicitation and wearing insignia so as to inhibit, deter or prevent organizational efforts on behalf of Local 687, Michigan Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL–CIO or any other union.

(b) Threatening employees with layoffs or unspecified reprisals for supporting Local 687, Michigan Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL–CIO or any other union.

(c) Coercively interrogating employees about their union activities.

(d) Laying off or otherwise discriminating against employees for membership in, support for or activities on behalf of Local 687, Michigan Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL–

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

CIO or any other union.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) If not already accomplished: within 14 days from the date of this Order, offer THOMAS WHITAKER, NICHOLAS McCREARY and ARTHUR CHASKIN full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed; and make them whole for any loss of earnings and other benefits suffered as a result of their discriminatory layoffs, in the manner set forth in the Remedy section of this decision.[12]

(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its jobsites and in its office in Plymouth, Michigan, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 6, 1997.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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[12] Any question as to whether McCreary forfeited his right to reinstatement by post layoff misconduct is deferred for resolution in the compliance phase of this proceeding.

[13] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. April 15, 1998

Robert T. Wallace
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- **To organize**
- **To form, join, or assist any union**
- **To bargain collectively through representatives of their own choice**
- **To act together for other mutual aid or protection**
- **To choose not to engage in any of these protected concerted activities.**

WE WILL NOT establish overly broad rules against solicitation and wearing insignia so as to inhibit, deter or prevent you from engaging in organizational efforts on behalf of Local 687, Michigan Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL–CIO or any other union.

WE WILL NOT threaten you with layoffs or unspecified reprisals for supporting Local 687, Michigan Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL–CIO or any other union.

WE WILL NOT coercively interrogate you about your union activities.

WE WILL NOT lay you off or otherwise discriminate against you for becoming a member of, supporting, or acting on behalf of Local 687, Michigan Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL–CIO or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL offer THOMAS WHITAKER, NICHOLAS McCREARY and ARTHUR CHASKIN full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed; and WE WILL make them whole, with interest, for any loss of earnings and other benefits suffered as a result of their discriminatory layoffs.

STERLING MILLWORK, INC.

(Employer)

Dated _____ **By** _____

(Representative) **(Title)**

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 477 Michigan Avenue, Room 300, Detroit, Michigan 48226–2569, Telephone 313–226–3244.